2001

Cory Leigh Kanth, Petitioner/Appellee, vs. Rajani Kannepalli Kanth, Respondent/Appellant : Brief of Appellee

Utah Supreme Court

Rajani K. Kanth; Pro Se.
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IN THE UTAH COURT OF APPEALS OF THE STATE OF UTAH

CORY LEIGH KANTH,

Petitioner/Appellee,

vs.

RAJANI KANNEPALLI KANTH,

Respondent/Appellant.

CASE NO. 20010718
DISTRICT COURT NO. 994904256

Priority #4

On Appeal from the Third Judicial District Court, Salt Lake County,
The Honorable Judge Bruce C. Luebeck

BRIEF OF APPELLEE

RAJANI K. KANTH
Respondent/Appellant, *Pro Se*
c/o The Economics Department
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List of All Parties:

The caption of the case contains the names of all parties except Akiko Kawamura, the *Guardian Ad Litem*.

TABLE OF CONTENTS

TABLE OF CONTENTS (Continued)

TABLE OF AUTHORITIES

Rules

Statutes

Publications

STATEMENT OF JURISDICTIONS

The Utah Court of Appeals has jurisdiction to hear this Appeal pursuant to Utah Code Annotated §78-2a-3 (1996).

ISSUES PRESENTED

Pursuant to Rule 24(b)(1) Utah Rules of Appellate Procedure the Appellee shall present a statement of issues presented for review by the Appellant. In doing so, the Appellee will attempt to restate the twenty different issues presented by the Appellant according to the Brief of Appellant.

1. Did the Court err in failing to stay the Utah State Court divorce proceedings while the Appellant's Appeal of the decision of Honorable Judge Tena Campbell dismissing his Petition filed under the International Child Abduction Remedies Act and the Convention on the Civil Aspects of International Child Abduction, including the Hague Convention (hereinafter referred to as "The Hague Convention") was pending before the United States Tenth Circuit Court of Appeals and the U.S. Supreme Court?

STANDARD OF REVIEW

The Court's decision not to stay the proceedings or continue the trial is discretionary and should be reviewed on an abuse of discretion standard unless it clearly violated any statutory provision in which case the Court should review the decision for correctness. Crossland Savings v. Hatch, 877 P.2d 1241, 1243 (Utah 1994).

2. Was the Court obligated to follow the provisions of the Utah Uniform Child Custody Jurisdiction Act and the Utah Uniform Child Custody Jurisdiction Enforcement

Act? If so, did the Court violate the terms of those statutes?

STANDARD OF REVIEW

To the extent that the requirements of the uniform acts are discretionary the Court should apply an abuse of discretion standard. To the extent that the Court is called upon to interpret these Acts the Court should grant no difference to the Trial Court but review its decisions under a correction of error standard. Western Kane County Special Service District #1 v. Jackson Cattle Co., 744 P.2d 1376, 1378 (Utah 1987).

3. Did the Court err in failing to permit the Appellant additional time to seek counsel?

STANDARD OF REVIEW

This decision should be reviewed under an abuse of discretion or manifest injustice standard. See Maughan v. Maughan, 770 P.2d 156, 159 (Ut. Ct. App. 1989).

4. Does the evidence support the Court's Findings of Fact?

STANDARD OF REVIEW

The party who challenges the Courts Findings of Fact "must marshal all the evidence in support of the Findings and then demonstrate that the evidence is insufficient to support the Findings in question." Marshall v. Marshall, 915 P.2d 508, 516 (Ut. Ct. App. 1996).

This requirement to marshal the evidence as well as the broad discretion accorded trial judges applies to Findings and Judgments regarding child custody, support and property division. Shioji v. Shioji, 712 P.2d 197, 210 (Utah 1985), Roberts v. Roberts,

835 P.2d 193, 198 (Ut. Ct. App. 1992); Rappleye v. Rappleye, 855 P.2d 260, 264 (Ut. Ct. App. 1993); Jackson v. Jackson, 617 P.2d 338, 340-341 (Utah 1980); Breinholt v. Breinholt, 905 P.2d 877, 882 (Ut. Ct. App. 1995); Sukin v. Sukin, 842 P.2d 922, 923 (Ut. Ct. App. 1992); Maughan v. Maughan, 770 P.2d 156, 159 (Ut. Ct. App. 1989) and Richie v. Richie, 784 P.2d 465, 468 (Ut. Ct. App. 1989).

5. The Appellant also raises several miscellaneous issues which may or may not be incorporated in the above issues including: (1) the alleged improper issuance of a Temporary Restraining Order; (2) whether the Commissioner had a conflict of interest; (3) whether the parties were required to submit to mandatory marital counselling (§30-3-11.1 (Utah Code Annotated 1969); (4) whether the Court properly permitted the Appellant's participation in Court hearings by telephone and pursuant to the UUCCJEA; and, (5) whether or not the Court should have ordered a child abuse investigation pursuant to §30-3-5.2 (U.C.A. 2001).

STANDARD OF REVIEW

These decisions are each discretionary or, if made in error did not prejudice the Appellant's rights below. In either case the standard of review is an abuse of discretion or manifest injustice standard. Maughan v. Maughan, 770 P.2d 156, 159 (Ut. Ct. App. 1989).

STATEMENT OF THE CASE

Nature of the Case

The parties separated in March 1999 when Cory Kanth returned to Utah with the

parties' two minor children Malini Amstel Kanth, age 8 and Anjana Kesari Kanth, age 6. The parties had been residing on a temporary basis in Australia immediately prior to the party's separation. Thereafter Appellant, Professor Rajani Kanth, commenced his Hague Convention Petition in the United States District Court for the District of Utah. The case was set for Trial December 9, 1999. In lieu thereof Judge Tena Campbell, United States District Judge, decided the case based upon the record when Mr. Kanth agreed to that procedure. Judge Campbell dismissed Appellant's Hague Convention Petition, December 14, 1999.

The Appellee filed her Complaint for Divorce July 2, 1999. The Appellant, Mr. Kanth, filed notice of the pendency of the Hague Convention Petition and, except for emergency proceedings (an Application for a Protective Order) nothing substantive occurred in the divorce case until January 20, 2000 after Judge Campbell's Ruling.

The Appellant sought a stay of execution of Judge Campbell's Ruling pending his Appeal of that decision. The Tenth Circuit Court of Appeals denied the Appellant's request for a stay of execution. The Tenth Circuit Order denying the Appellant's request for a stay is dated January 19, 2000. The Tenth Circuit Court of Appeals ultimately sustained Judge Campbell's decision. The Supreme Court of the United States denied the Appellant's Petition for a Writ of Certiorari as well as his Request for Rehearing.

The Trial of this matter was scheduled for and conducted on June 18, 2001. The Appellant appeared through counsel. Appellant's attorney requested leave to be excused from the proceedings. This Motion was granted based upon the Court's advice to

Appellant's counsel that in the absence of the Appellant or his attorney the Court would enter the Appellant's default if he did not wish to appear and participate in the proceedings. Appellant's counsel was excused and the Appellant's default was entered.

The Court went on to take detailed evidence at the time of Trial and entered appropriate Findings of Fact, Conclusions of Law and a Decree of Divorce which the Appellant challenges on Appeal.

Prior to the trial the Court entertained several Motions for Temporary Relief and the Appellee's request for a Temporary Restraining Order on one occasion. The Decree grants Appellee a divorce, awards her sole custody of the parties' children and imposes restrictions on the Appellant's visitation rights. The Decree also divides the parties' property, establishes ongoing child support and spousal support and enters judgment for child support and temporary alimony arrearages which had accrued during the pendency of the action. The Decree awards attorneys' fees and a judgment for costs in favor of Cory Kanth. These fees cover fees incurred in the State Court divorce proceedings, the Hague Convention proceedings, and attorneys' fees incurred in connection with the Australia divorce proceedings. The total award of fees and costs was $68,540.38.

STATEMENT OF FACTS

1. The Appellee, Cory Kanth, commenced these proceedings on July 2, 1999 by filing her Complaint for Divorce. (Index on Appeal pp. 1-6).

2. July 14, 1999 Appellant, Rajani Kanth filed his Hague Convention Petition in the U.S. District Court for the District of Utah. An initial hearing was scheduled for

August 24, 1999. At the time of the initial hearing a Stipulation was reached between the parties to the Hague Convention Federal Court action which would have resulted in the dismissal of that action. However, Mr. Kanth dismissed his attorney's of record and sought a rescission of that stipulation which was granted by Judge Tena Campbell on September 9, 1999. A subsequent hearing was scheduled for October 18, 1999. (Index on Appeal pp. 14, 15; "Order" Judge Tena Campbell, Case No. 2:99CV532C, Appellee's Index).

3. Judge Campbell entered an "Order" dismissing the Appellant's Hague Convention Petition on December 14, 1999. Subsequently, Judge Campbell declined any further relief sought by Mr. Kanth because he had flied a Notice of Appeal. That Order is dated December 17, 1999 (Appellee's Addendum "A," U.S. District Court Order dated December 14, 1999; Appellee's Addendum "B,"U.S. District Court Order dated December 17, 1999).

4. Following the dismissal of the Hague Convention proceedings the Appellee, Cory Kanth prosecuted her divorce action seeking temporary relief by way of an Order to Show Cause which was ultimately heard by the Court on January 20, 2000. (Index on Appeal pp. 20-26, 98-102).

5. The Appellant was represented by counsel at the hearing and had moved the Court for an Order staying the proceedings pending the Appeal of Judge Campbell's Order dismissing the Hague Petition. (Index on Appeal pp. 37-38). However, the Tenth Circuit Court of Appeals had denied Appellant's request for stay on January 19, 2000.

(Appellee's Addendum "C").

6. The Appellant quickly discharged his attorney and attempted to represent himself *Pro Se* in several objections, letters, and other communications. Prior to discharge Appellant's counsel objected to the Commissioner's Recommendation (Index on Appeal pp. 64-67).

7. The Commissioner denied the Appellant's request for a stay noting that they Hague Convention had been dismissed and that there was no authority for the proposition that the Appeal should result in a stay of the State Court matters. The Commissioner noted that the Australia action did not preclude proceedings going forward in this matter. The Court went on to enter temporary relief. The Appellant had sought, through counsel, to raise the issue of "acquiescence" and therefore had made an appearance ostensibly as a "special appearance." However, the Appellee had stipulated that the Appellant's appearance in the State Court proceedings would not be considered acquiescence in the Hague proceeding. (Index on Appeal pp. 62-63).

8. The Appellant was before the Court based upon service of Summons that accompanied the Complaint which was served upon him personally on August 21, 1999 while he was in the State of Utah. (Index on Appeal pp. 12-13).

9. At not time prior to the hearing of the Appellee's Motion for Temporary Relief did the Appellant raise any issue regarding a conflict of interest. Afterwards, the Appellant alleged that Commissioner Arnett had earlier represented him in another proceeding and Judge Stirba instructed the Appellant's counsel to "investigate this claim

and file a Motion to Recuse if that action is deemed to be appropriate." (Index on Appeal pp. 68-70).

10. Commissioner Arnett subsequently voluntarily recused himself and Commissioner Susan C. Bradford was assigned to the case. (Index on Appeal p. 144).

11. The Appellee sought and received a Temporary Restraining Order June 14, 2000 which required the immediate return of the children when it appeared that the Appellant was preparing to remove the children from the jurisdiction of the State or the children may have been exposed to verbal or emotional abuse in violation of the Court's earlier Order. (Index on Appeal pp. 174-175).

12. Following the July 20, 1999 hearing the parties were frequently before the Court on various requests for relief filed by both parties.

13. The Appellant formally complained of Commissioner Susan C. Bradford's conduct resulting in her recusal from the case. (Index on Appeal p. 338).

14. The matter was set for Pre-Trial Settlement Conference initially scheduled for November 6, 2000. The Appellant sought a continuance thereof. (Index on Appeal pp. 339-342).

15. On November 2, 2000, the United States Court of Appeals for the Tenth Circuit denied the appeal of Mr. Kanth. (Index on Appeal pp. 643-647).

16. Throughout the proceedings the Appellee attempted to conduct discovery by way of Interrogatories, Requests and Depositions. The Appellant consistently failed to respond to any discovery. Ultimately, Judge Timothy R. Hanson extended discovery

until shortly before Trial in June 2001. Nevertheless, the Appellant failed to respond.

17. By and large the Appellant appeared "specially" ostensibly to prevent a defence of "acquiescence" in the Federal Court proceedings. However, at times, the Appellant made a general appearance in the case. (Index on Appeal pp. 841-842, a Stipulation signed personally by the Appellant).

18. On November 6, 2000, the Appellant's default was entered for his failure to appear at the Pre-Trial Settlement Conference because ". . . he has refused to address the substantive issues in this matter despite repeated requests and opportunity to do so." (Minutes of Pre-Trial Conference, Michael S. Evans, Index on Appeal p. 370).

19. On December 6, 2000, the Court entertained the several objections of the Appellant to Commissioner's Recommendations. The Appellant's objections were overruled. The Court specifically found that it had jurisdiction in the matter and scheduled an evidentiary hearing on the issue of temporary custody for February 8, 2001 at 9:30 a.m. At that same time the Court ordered the parties to stipulate to a custody evaluator by December 20, 2000. The Court continued supervised visitation. (Index on Appeal p. 806).

20. The Appellant's default was entered again February 1, 2001 for his failure to appear. At that same time the Court denied the Appellant's objection to the February evidentiary hearing which had been scheduled by Judge Stirba in December. (Index on Appeal p. 951).

21. On the day before the evidentiary hearing scheduled by Judge Stirba to

consider temporary custody, H. Russell Hettinger entered his appearance as attorney for the Appellant. (Index on Appeal p. 956).

22. While attorney Hettinger initially entered a "special appearance" his appearance on February 8, 2001 did not preserve any rights and constituted a general appearance. On February 8, 2001, the Appellant's Motion to Continue the evidentiary hearing was granted. Appellee's Motion to Strike the Appellant's Pleadings was denied. All discovery was ordered completed by May 15, 2001. A two-day bench Trial was scheduled for June 18-19, 2001. The Appellant did not register any objection to the trial setting. (Index on Appeal p. 965).

23. On April 3, 2001, the Appellant, appearing generally, sought a Restraining Order through counsel of record. The Restraining Order was entered prohibiting the Appellee from conducting the baptism of the parties' child, Malini Kanth until further order of the Court. A hearing was set for April 13, 2001.

24. The April 13, 2001 hearing was heard by Judge Timothy R. Hanson. By that time the parties had reached a Stipulation permitting the baptism of Malini. The Appellant agreed at that time to undergo a psychological evaluation and to choose from one of the nominated evaluators by April 16, 2001 5:00 p.m. The Court vacated the earlier Order to conclude discovery and the custody evaluation. (Index on Appeal p. 1036).

25. On April 20, 2001, the Appellant filed Notice of Depositions of the Appellee and her mother. (Index on Appeal pp. 1044-1045).

26. The Court appointed Dr. Natalie Malovich to conduct a custody evaluation on April 3, 2001.

27. Dr. Malovich prepared a "Psychological Evaluation and Interactive Assessment." However, the Appellant did not participate in that process. (Findings of Fact ¶23).

28. On June 4, 2001, Judge Bruce C. Luebeck denied the Appellant's Motion to Stay the Proceedings or Continue the Trial. (Index on Appeal p. 1158).

29. The Trial Court denied the Motion to Continue or Stay for the following reasons:

a. The Court had personal jurisdiction over the parties and subject matter jurisdiction.

b. The mere pendency of the Petition for a Writ of Certiorari before the United States Supreme Court was not sufficient grounds to stay the State Court proceedings where the Tenth Circuit Court of Appeals had refused Appellant's Motion for Stay.

c. The Appellee through counsel had stipulated that the Appellee would waive any claim or defence of acquiescence and, in fact, the Appellee had not asserted any such claim in any proceedings based upon Mr. Kanth's appearance in the State Court Proceedings.

d. At previous hearings in anticipation of the Trial no objection was made to the setting of the Trial or discovery cut off dates even

though the Petition for Writ of Certiorari was pending.

e. The Court had the option to enter a provisional or interim Order pending any decision by the Supreme Court.

f. It was unknown when the Supreme Court would make a decision and there was a need for finality of the State Court proceedings.

g. The Court did not find that the Appellant's compliance with the Court's Order could be deemed "acquiescence." (Index on Appeal pp. 1180-1184).

30. The Court entered Findings of Fact, Conclusions of Law and a Decree of Divorce August 1, 2001. (Index on Appeal pp. 1185-1227).

31. The Appellant herein petitioned the United States Supreme Court for a rehearing after the United States Supreme Court denied his Petition for a Writ of Certiorari. (Index on Appeal pp. 1231-1238; Appellee's Addendum "D").

32. The United States Supreme Court denied the Motion for rehearing. (Appellee's Addendum "E").

SUMMARY OF ARGUMENT

1. The Court did not err in refusing to stay the State Court proceedings and continue the June 18, 2001 Trial setting. The Court did not enter a temporary award of custody until after the dismissal of the Appellant's Hague convention proceeding. Thereafter, the Appellant's attempts to stay enforcement of Judge Tena Campbell's Order dismissing his Hague Convention proceeding were denied. The mere pendency of an

Appeal without a stay of execution of the Order dismissing the Hague Convention Petition is not grounds to stay State Court proceedings. The Appellant has misconstrued the doctrine of acquiescence in connection with Hague Convention proceedings. The prosecution of the State Court case did not impair the Appellant's Hague Convention rights. The Appellant freely took advantage of State Court proceedings when it suited him. He should be barred from complaining about the exercise of State Court jurisdiction now. The Temporary Orders of the State Court do not constitute decisions "on the merits" as contemplated by the Hague Convention.

2. The various Temporary Orders of the State Court do not violate the terms of the Utah Uniform Child Custody Jurisdiction Act (UUCCJA) or the Utah Uniform Child Custody Jurisdiction Enforcement Act (UUCCJEA). The UUCCJEA did not become effective until July 1, 2000. While the UUCCJEA does contain a clause which would apply its terms to international cases, by the time it was effective in this case the Appellant's Hague Court Petition had been dismissed. The UUCCJA was ambiguous as to whether it applied to international custody conflicts except when it came to enforcement of foreign Decrees entered in substantial compliance with the terms of the UCCJA. By dismissing the Appellant's Hague Convention Petition it was resolved that the children's "home State" or State of "habitual residence" (pursuant to the Hague Convention) was the United States, State of Utah and not Australia. That being the case, neither uniform act would have applied in this case. Prior to the dismissal of the Appellant's Hague Convention Petition the Utah Court was authorized to enter a custody

order (even though it did not) pursuant to the "vacuum jurisdiction" provisions of both uniform acts.

3. The Court did not err in failing to postpone hearings or stay the State Court proceedings in order to permit the Appellant time to retain counsel. The Appellant was represented by two attorneys on two separate occasions during the State Court proceedings. He was represented by an attorney at the time of the Trial. There is no indication in the record that his claims or defences were prejudiced to any degree because of his voluntary failure to secure counsel at any particular time during the pendency of the case.

4. The Appellant has failed to marshal the evidence and facts which would support the Court's Findings and his objections thereto should be denied. In spite of entering the default of the Appellant the Court took extensive testimony at the time appointed for the Trial. Based upon that evidence the Court entered detailed Findings of Fact. The evidence supports the Findings. The Appellant has failed to marshal the evidence which supports the Findings. Therefore, the Appellant's objection to the Findings should be dismissed and denied.

5. The other grounds for Appeal each lack merit. The Appellant sites a number of other grounds as a basis for Appeal. These include:

a. The failure of the Court to require an investigation based upon the Appellant's allegations of abuse. §30-3-5.2 (U.C.A. 2001) is not mandatory but, rather, discretionary. In any case, the Court did

order a custody evaluation which would have served the purpose of this provision. The Appellant failed to cooperate with that evaluation and it proved that the children were not subject to any abuse.

b. The Court facilitated the appearance and participation of the Appellant in all hearings by whatever means suited the Appellant whenever the Appellant chose to appear other than in person. Therefore, the Courts did not violate the terms of the UUCCJEA 111(b). By that time, the terms of that act did not apply in any case because the Hague Convention Petition had been dismissed.

c. The Court had sufficient grounds to enter the Temporary Restraining Order for the return of the children under the circumstances described in the Motion and the Appellee's Affidavit. In any case, the Appellant was not prejudiced.

d. The Appellant failed to raise any issue regarding conflict of interest regarding Commissioner Arnett until after the hearing. When the issue was raised Commissioner Arnett voluntarily recused himself. There was no prejudice.

e. The mandatory counselling requirements of §30-3-11.1 (U.C.A. 1969) have never been implemented or enforced by the Court.

f. Any other requests for relief or grounds for Appeal sited by the

Appellant are incorporated in the above or are unintelligible and cannot be responded to.

ARGUMENT

I THE COURT DID NOT ERR IN REFUSING TO STAY THE STATE COURT PROCEEDINGS AND CONTINUE THE JUNE 18, 2001 TRIAL SETTING.

The Appellant generally asserts that because he filed his Hague Convention Petition after these divorce proceedings were commenced the State Court proceedings should abate pending a resolution of the issues raised by his Federal Court Petition. Article 16 of the Hague Convention provides:

> "Article 16: After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the contracting State to which the child has been removed or in which the child has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice."

The Appellant misconstrues Article 16 and its application to this case. First of all, it was never determined that the Appellee, Cory Kanth, wrongfully removed the children from their habitual residence. That was the issue before the Federal Court. It was decided contrary to the Petition of Mr. Kanth.

Even if the Appellant's interpretation of Article 16 is correct, it would only inhibit the Utah Court from entering a custody determination up until the point that the Appellant's Hague Convention proceeding was dismissed. The Utah Courts made no custody determination until after Mr. Kanth's Hague Convention Petition was dismissed

and the Tenth Circuit Court of Appeals had denied his request to stay that Order.

Furthermore, any temporary order of the Utah Courts regarding custody could not be considered a decision "on the merits" as contemplated by Article 16. Such temporary orders would not be final orders nor would they be based upon an evidentiary hearing. A hearing on the merits did not occur until June 18, 2001 at the trial. This occurred long after the dismissal of the Appellant's Hague Convention Petition and the rejection of his Appeal by the Tenth Circuit Court of Appeals.

Until the U.S. Federal District Court dismissed the Appellant's Hague Convention Petition it was unknown which state would have jurisdiction over the custody aspects of this case. The purpose of the Hague Convention Petition was to determine that issue. The Hague Convention Petition raises the issue of the children's "habitual residence." The State of "habitual residence" has jurisdiction according to the Hague Convention to determine issues related to the custody of the children. Until that determination is made there would be a jurisdiction void or vacuum.

The Appellant also suggests that the Utah State action should have been stayed and the trial continued because he could not participate in the proceedings without "acquiescing" to United States as the State of habitual residence. In so doing, the Appellant misconstrues the defence of "acquiescence" in Hague Convention proceedings. The Appellee herein did in fact raise the defence of acquiescence in the Federal Court proceedings. However, this defence was not based upon the Appellant's participation in the State Court proceedings. Rather, the defence of acquiescence referred to Mr. Kanth's

letter of April 5, 1999 where he indicated that "I am ready now to return to Utah and look for employment there, no matter what it takes." This behavior gives rise to the defence of acquiescence. (See, Re A and another (minors) (abduction: acquiescence) [1992] I ALL ER 929, CA; [1992] FAM. 106 and Appellee's Brief before the Tenth Circuit Court of Appeals, Appellee's Addendum "F".) It should be noted that Appellant's habit of making "special appearances" had nothing to do with the Court's lack of jurisdiction over the subject matter or the Appellant. The Appellant was duly served with a Summons and Complaint while he was in the State of Utah and he never contested the Court's jurisdiction.

The Appellant offers no authority for the proposition that an appeal of the dismissal of a Hague Convention Petition, where no stay of execution has been entered, would prohibit the State Court from entering a custody Order because of Article 16 of the Convention. Even so, the Utah Trial Court was mindful of the pending Petition for Writ of Certiorari before the United States Supreme Court and "left the door open" to reconsider its custody order in the event the Supreme Court overruled Judge Campbell and the Tenth Circuit Court of Appeals. The Court's "fail safe" provision turned out to be unnecessary because the Supreme Court denied the Petition as well as the Appellant's Petition for rehearing.

The Trial Court's Order denying the Motion to Stay Proceedings and Continue the Trial fully articulates the basis for that Order. In addition to the basis set forth in the Court's Order it should be noted that the Appellant did not hesitate to take advantage of

the Utah Court's when it suited him and without making a "special appearance." Therefore, when the Appellant felt that he would benefit from a Temporary Restraining Order he applied for and received such an order restraining the Appellee from going forward with a baptism of the parties' daughter. The Appellant should not now claim that the Court lacked jurisdiction and authority (in spite of Article 16 of the Hague Convention) to enter a custody Order on a temporary basis or on the merits. Stichting Mayflower Mt. Fonds v. Jordanelle Special Services District, 429 UT App. 257, 429 Utah Advance Reports 28 at ¶25 (Ut. Ct. App. 2001).

When the Appellant voluntarily refused to participate in the trial of this case he knowingly relinquished his rights and knowingly allowed the Trial Court to enter his default. Furthermore, the entry of the Appellant's default follows his history of neglecting these proceedings and disobeying the various Court orders including: (1) Appellant's failure to attend the Pre-Trial Settlement Conference on penalty of default after it had been continued at his request, (2) Appellant's failure to participate in discovery, (3) Appellant's failure to participate in the custody evaluation; and, (4) Appellant's failure to pay alimony and child support. The Court Commissioner had earlier entered the default of the Appellant and also deferred the issue for determination by the Judge at a later date. It should be of no help to the Appellant that his failure to participate in the proceedings (except when he whished or when it would benefit him) was based upon the same rational as his failure to participate in the Trial.

II THE VARIOUS TEMPORARY ORDERS OF THE STATE COURT DO NOT VIOLATE THE TERMS OF THE UTAH UNIFORM CHILD CUSTODY JURISDICTION ACT (UUCCJA) OR THE UTAH UNIFORM CHILD CUSTODY JURISDICTION ENFORCEMENT ACT (UUCCJEA).

Appellant claims that the Trial Court and Court Commissioner violated the terms of the UUCCJA and the UUCCJEA. This violation occurred in the form of the lower Court's entry of a "child-custody determination" and, thereafter continued as the Court ignored the other provisions of one uniform act or the other. The Appellant has misunderstood the application of the uniform acts. It is obvious that neither act was applicable in this case because the Court did not make a "child-custody determination" until after the dismissal of the Appellant's Hague Convention proceeding. Even if the uniform acts applied the entry of a "child-custody determination" on a temporary basis, or on the merits, would not be a violation of either uniform act. The UUCJA did not apply to international custody cases except for the recognition and enforcement of custody Decrees of other States. Paragraph 23 of the UUCJA was vague and generally interpreted not to apply to international disputes except when it came to enforcing foreign Decrees. See *The ABC's of the UUCCJEA: Interstate Child-Custody Practice Under the New Act,* Family Law Quarterly, Vol. 32, No. 2, Summer 1998, Patricia M. Hoff. It is because the UCCJA was ambiguous about international issues that the UUCCJEA included the new Section 105 which provides that a Court of this State shall treat a foreign country as if it were a State of the United States for the purpose of applying Articles 1 and 2 of the act. The Utah adoption of the UUCCJEA did not occur until July 1, 2000. It does not appear

that there is any potential violation of the UUCCJEA after its effective date.

Neither uniform act applied to these proceedings at any time. This is because by the time the Utah Court made a "child-custody determination" the Federal Court pursuant to Hague Convention had determined that the United States was the State of habitual residence thereby making Utah the "home state" under both uniform acts. Therefore, under Section 201 of the UUCCJEA (and a similar provision of the UUCCJA) Utah was the home State for the children permitting Utah to proceed with an initial "child-custody determination." Essentially, by dismissing the Appellant's Hague Court Convention Petition not only did the Federal Court find the United States and Utah to be the "home state" but the Court also found that the absences of the parties from Utah were only temporary and would not interfere with the requirement of six months residency immediately prior to the commencement of the proceedings.

Even though the Utah Court did not make an initial "child-custody determination" prior to the dismissal of the Hague Court Petition the Utah Court would have been permitted to make such an initial "child-custody determination" under the "vacuum jurisdiction" provision of the uniform acts. Both uniform acts include a provision allowing the State to make an initial "child-custody determination" if ". . . no Court of any other State would have jurisdiction under the criteria specified in paragraph (1), (2), or (3)." Inasmuch as the children were physically residing in Utah at the time of the commencement of the Australia dissolution proceedings, but the Appellant claimed they had not been residing in Utah for six months prior to the commencement of the Utah

proceedings, there was a temporary vacuum or void of jurisdiction. At that point in time and prior to the dismissal of the Hague Court Petition, neither Court had clear jurisdiction over the "child-custody determination" issues. This fact together with the children's physical presence in Utah would vest Utah with jurisdiction under the uniform acts for purposes of an initial "child-custody determination." Such a determination would, obviously, be subject to any ruling regarding "habitual residence" under the Hague Convention. As it happens, "habitual residence" and therefore the children's home State was determined by the United States Federal Court for the District of Utah prior to the Utah Courts making any "child-custody determination." Furthermore, given the dismissal of the Hague Convention Petition which would have called for the return of the children to Australia if the Petition had been granted, all "child-custody determinations" by the Utah Courts are consistent with and authorized by the two Uniform Child Custody Jurisdiction Acts (the uniform acts are set forth in the Appellant's Addendum (f) and (g). The Hague Convention is set forth in (d) of the Appellant's Addendum and the International Child Abduction Remedies Act "ICARA" is (e) to the Appellant's Addendum).

III THE COURT DID NOT ERR IN FAILING TO POSTPONE HEARINGS OR STAY THE STATE COURT PROCEEDINGS IN ORDER TO PERMIT THE APPELLANT TIME TO RETAIN COUNSEL.

The record does not support the Appellant's claim that he was denied the right to counsel or due process. The Appellant employed at least two attorneys as his counsel of

record. There is no indication that the Appellant was impaired or restrained in his opportunity to retain counsel. In addition to the two attorneys he employed in the State Court proceedings, the Appellant employed a local attorney and a Hague Convention specialist in the Federal Court proceedings. Any decision of the Appellant to proceed as his own attorney was voluntary and knowing. There is no indication any where in the record that the Appellant was without funds, time or opportunity to retain counsel whenever he wished. In fact, the Appellant has become very adept at acting as his own attorney. Therefore, the failure to continue any particular proceeding to permit Appellant to retain counsel was not an error. In Re: Complaint Against Smith, 925 P.2d 169 (Utah 1996).

It is also important to note that the Appellant had counsel at the trial of this case but voluntary refused to participate in that proceeding. The absence of counsel or the opportunity to retain counsel during the pendency of the case would not have worked any prejudice on the Appellant and there is no evidence that he was prejudice by his failure to be represented by counsel during the pendency of the case. During the critical time of this case, from February 2001 through June 2001 the Appellant was represented by counsel.

IV THE APPELLANT HAS FAILED TO MARSHAL THE EVIDENCE AND FACTS WHICH WOULD SUPPORT THE COURT'S FINDINGS AND HIS OBJECTIONS THERETO SHOULD BE DENIED.

The Appellant has utterly failed to marshal the evidence which would support the

Court's Findings. The Appellant has included in his Addendum a "Trial Transcript" of unknown origin. It is not apparent who transcribed the record. However, assuming that it is a correct transcription the Appellant has had at his disposal not only the transcript of the trial proceedings but other proceedings which were conducted during the pendency of the case below. In spite of that, the Appellant has failed to marshal the evidence at his disposal and that failure is fatal to the numerous grounds for Appeal which appear to attack the Trial Judge's Findings of Fact. Marshall v. Marshall, 915 P.2d 508 (Ut. Ct. App. 1996).

V THE OTHER GROUNDS FOR APPEAL EACH LACK MERIT.

The remaining issues for review stated by the Appellant lack merit.

The Appellant sites other issues for review on Appeal. They include the following:

a. The Appellant claims that the Court erred in not conducting an investigation through the Division of Child and Family Services. However, §30-3-5.2 (U.C.A. 2001) does not require that the Court order an investigation. An investigation is discretionary. Furthermore, the Court took advantage of the Appellant's suggestion that a custody evaluation be conducted. The Appellant, however, totally failed to cooperate with that custody evaluation. The custody evaluation conducted and completed by Dr. Natalie Malovich does not support any finding of abuse.

b. The Appellant takes issue with the Court's use of a Temporary Restraining Order requiring the return of the children during his visitation in June 2000. The Temporary Restraining Order was necessary in order to secure the return of the children who were being held over by the Appellant. Additionally, the evidence suggested that the children may be removed from the jurisdiction all together. The Appellant relies upon case law interpreting Rule 65A, Utah R. Civ. Proc. However, the Appellant ignores Rule 65A(f) which recognizes the equitable powers of the Courts in domestic relation cases. Even if the Temporary Restraining Order was improperly issued the Appellant has sited not prejudice which could be corrected on Appeal.

c. The Appellant complains of an alleged conflict of interest involving Commissioner Arnett. After the hearing before Commissioner Arnett the Appellant raised the issue. The Appellant alleged that Commissioner Arnett had years earlier represented the Appellant in connection with his previous divorce and on a very limited basis. Commissioner Arnett voluntarily recused himself from any further consideration of this case. The Appellant did not raise the issue prior to the hearing. The Appellant may have waited to see if the Recommendation of the Commissioner was favorable. In any case,

the Appellant cannot complain about an issue that he did not raise until after the fact

d. The Appellant has misconstrued the provisions of §30-3-11 2 (U C A 1969) This act does not require family counselling and the absence of any Court ordered family counselling would not have effected the outcome of this case and is not a proper issue for Appeal

e. The Appellant complains that the Court did not abide by the provisions of §30-3-32 b [sic] (U C A 2001) Assuming that the Appellant refers to §30-3-32(2)(b) (U C A 2001) the Appellant means to attack the Courts assessment of "the child's interests " As such the Appellant is attacking the Court's Finding of Fact and Conclusions without marshaling the evidence which was presented at trial. It is significant to note that the Courts decision incorporates the recommendations and findings of the Court appointed expert custody evaluator, Dr. Natalie Malovich No evidence which would contradict Dr. Malovich's findings or the Court's Conclusions was introduced by the Appellant.

f. The Appellant attacks the Court's Findings regarding child support and alimony. However, the Court has met the requirements of Utah law in entering its Findings and Conclusions to support the award.

The Court properly determined the parties' incomes, the needs of the Appellee and the apparent ability of the Appellant to assist the Appellee in meeting her financial needs.

CONCLUSION

The Trial Court did not err in failing to stay the divorce proceedings and continue the Trial. The Court did not enter an initial "child-custody determination" until after the dismissal of the Appellant's Hague Convention Petition. Even if the Court had made such a ruling it would have been permissible given the vacuum of jurisdiction which existed up until the dismissal of the Hague Convention Petition. The Appellant has misconstrued the acquiescence defence in Hague Convention proceedings.

Neither Uniform Child Custody Jurisdiction Act precluded the Court from entering temporary and ultimate relief in connection with child custody.

The Court did not err in failing to permit the Appellant additional time to seek counsel. The Appellant has failed to marshal the evidence which supports the Court's Findings and Decree and should be barred from challenging those Findings. The remaining issues raised by the Appellant, even if well taken, did not prejudice the Appellant and are not a proper subject for Appeal.

The Court's entry of the Appellant's default was proper given the Appellant's failure to participate in the proceedings and his failure to appear at the Trial.

The Appellee should be awarded her fees in connection with this Appeal.

DATED THIS 22nd day of March, 2002.

Respectfully Submitted,

FREDERICK N. GREEN
Attorney for Petitioner/ Appellee

CERTIFICATE OF SERVICE

I hereby certify that I am a member or and/or employed by the law firm of Frederick N. Green, 7390 South Creek Road, Suite 104, Sandy, Utah 84093, and that in said capacity and pursuant to Rule 5(b), Utah Rules of Civil Procedure, a true and correct copy of the foregoing **BRIEF OF APPELLEE** was served by:

__X__ Depositing the same in the U.S. Mail, postage prepaid and correctly addressed;

_____ Hand delivery; and/or

_____ Facsimile transmission.

upon the following on this 25th day of March 2002:

RAJANI K. KANTH
Respondent/Appellant, *Pro Se*
c/o The Economics Department
National University of Singapore
1 Arts Link
Singapore 1175570

Akiko Kawamura
Guardian Ad Litem
HOBBS, ADONDAKIS & OLSON, LLC
Felt Building, Suite 208
341 South Main Street
Salt Lake City, Utah 84111

Frederick Green

ADDENDUM

A Order, dated December 14, 1999.

B Order, dated December 17, 1999.

C Order, dated January 19, 2000.

D Letter from Supreme Court, dated June 25, 2001.

E Letter from Supreme Court, dated August 27, 2001.

F Appellee's Brief Tenth Circuit Appeal, dated March 10, 2000.

ADDENDUM “A”

DEC 14 99

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

RAJANI K KANTH, Plaintiff, vs CORY LEIGH KANTH, Defendant	ORDER Case No. 2:99CV532C

Mr. Kanth has filed this petition under the International Child Abduction Remedies Act, 42 U.S.C. § 11601-11610 ("ICARA"), and the Convention on the Civil Aspects of International Child Abduction, included in the Hague Convention adopted on October 25, 1980 ("the Hague Convention"). Mr. Kanth alleges that Mrs Kanth wrongfully removed the children from Australia to the United States, and that, under the Hague Convention, the children must be returned to Australia so that the courts of that country can determine custody. For the reasons stated below, Mr. Kanth's petition is denied.[1]

Background

[1]This matter was set for oral argument on December 9, 1999. However, Mr. Kanth, who now lives in New York, requested that oral argument be continued. Because the progress of this case has been slow, the court was reluctant to grant such a continuance. Mr. Kanth agreed that the court could resolve the matter on the basis of the written material, without oral argument. The court has now carefully considered the materials of the parties (those that were filed within the deadlines set by the court) and concludes that oral argument would not assist the court in reaching a decision.

19

Mr. and Mrs. Kanth and their two daughters are citizens of the United States Mr. Kanth was born in India, but moved to the United States. He became a naturalized United States citizen in 1985. Mr. and Mrs. Kanth were married in Salt Lake City, Utah, in March 1990. Both of the Kanth daughters were born in Salt Lake City: Malini Amstel Kanth in 1993 and Anjana Kesari Kanth in 1996

Mr Kanth is a college professor In 1993, the University of Utah denied Mr. Kanth tenure. Although he made application to numerous universities, he was unable to find an acceptable position in the United States. In 1996, Mr. Kanth accepted a temporary academic position with the University of Aarhus in Denmark; he left the United States in June of that year. Mrs. Kanth and the children stayed in Salt Lake City until September 1996, when they joined Mr. Kanth in Denmark.

The Kanths did not stay long in Denmark. Mrs. Kanth and the children returned to Salt Lake City in April 1997; Mr. Kanth returned in September of that year. Following their return, Malini enrolled in a preschool in Salt Lake City. According to Mrs. Kanth, Malini made friends in the preschool and generally excelled.

Because Mr. Kanth was not able to locate an acceptable academic position in the United States, he again accepted a teaching position in a foreign country, at the University of New South Wales, Australia. Mrs. Kanth opposed the move, consenting to go only when Mr. Kanth told her that the family's stay in Australia would last only six months.[2] The Kanth family traveled to

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[2]Mr. and Mrs. Kanth disagree sharply over whether they intended that their stay in Australia would be permanent or temporary. The evidence before the court, as discussed below, leads the court to the conclusion that Mrs. Kanth is correct when she states in her affidavit that neither she nor Mr. Kanth intended to permanently settle in Australia.

Australia on temporary visas, arriving in July 1997. They left behind most of their household furnishings and personal belongings, including many of the children's toys. These items were stored primarily with Mrs. Kanth's family in Salt Lake City. (See Cory Leigh Kanth Aff. Exhibits) (Photographs).

The Kanth family was in Australia for a total of nine months, from July 1997 to April 1998. While in Australia, Mr Kanth continued to seek teaching positions in the United States When his efforts were unsuccessful, he agreed to continue in his teaching position at the University of New South Wales for six months. However, Mr. Kanth did not complete this second six-month term. He and his family returned to Salt Lake City in April 1998. When the family left Australia, they broke their lease on their apartment and forfeited a $1,120 rental bond.

Although Mrs. Kanth states that the family returned to the United States because Mr. Kanth had an interview at Franklin and Marshall College in Pennsylvania, a fact the court accepts as correct, two letters submitted to the court by Mrs. Kanth indicate that the family may have also left Australia as a result of Mr. Kanth's personal difficulties. The first letter is from Dr. Graham Voss, Associate Head of the School of Economics at the University of New South Wales. In the letter, Dr. Voss acknowledged that Mr. Kanth was resigning his "visiting position" as of April 2, 1998. Dr. Voss stated: "Again, let me express my sympathies with your difficulties and wish you and your family all the best in the future." (Cory Leigh Kanth Aff. Exs. at 193) (Letter from Voss to Kanth of 3/30/1998). The second letter was sent by a counselor (the signature is illegible) from the Solution Focused Counselling Centre. The author obviously knew of problems Mr. Kanth was facing. The letter begins: "Thanks for the post card. Obviously you made it back to Utah

and memories of Australia have hopefully faded a little " (Id. at 195) (Letter of 5/11/1998). After giving Mr. Kanth encouragement and advice about his mental and emotional state ("I am impressed that you have started work on controlling your 'demons'"), the author concludes with the statement: "Hope you will be smiling more now that you are back in the States. Keep in touch " (Id.)

Back in Utah, the children apparently settled into the routine and practices they had had before the move to Australia. Malina returned to the same preschool The children renewed their ties with Mrs. Kanth's family, with whom the children were very close. (Mrs. Kanth's family were the only relatives the children knew). The children were seen by Dr. Tom Metcalf, who had been their pediatrician since their births. (The children were seen by several different doctors for illnesses in Australia).

Mr. Kanth accepted a temporary research fellowship at Harvard University, and pursued his interview opportunity in Pennsylvania. Mr. Kanth hoped that his Harvard fellowship would help him obtain a teaching position in the United States. Roger Owen of Harvard University wrote a letter of recommendation for Mr. Kanth. In his letter, Mr. Owen noted:

> Since leaving the University of Utah Rajani has led a somewhat peripatetic existence, teaching in Denmark and Australia and working on his general critique of Enlightenment thinking. He continues to be as productive of new ideas as ever. But he certainly needs somewhere to rest awhile if he is to exploit these new veins of thought to the full.

(Id. at 020) (Letter from Owen to Kanth of 5/11/1998).

When Mr. Kanth did not find a teaching position in the United States, he accepted a three-year position at the University of Technology ("UTS") in Sydney, Australia, and the Kanth Family

left for a second stay in Australia in July 1998. Again, most of the family's furniture and personal belongings were left behind in Salt Lake City.

Although Mr. Kanth contends that the family intended to stay in Australia, the evidence in the record does not support his contention. Mrs. Kanth states in her affidavit that they left reluctantly for Australia, and that Mr. Kanth had assured her they would return to the United States by autumn in 1998 Mr. Kanth believed that he would soon have a job with Duke University. Mrs. Kanth's statement that her husband anticipated that he would be receiving a job offer from Duke University is corroborated by an e-mail message, sent by Mr. Kanth to Mrs. Kanth's father, telling him of the family's address in Sydney and asking him to "send us any normal mail to the new address indicated above (this is important since DUKE UNIVERSITY will be writing to me at your address) OR you can open the mail and read it to see what it says and then call us (this is better for being much FASTER.)" (Id. at 056) (e-mail from Kanth to Meyer of 7/23/1998).

When the position at Duke University did not materialize, Mr. Kanth continued to apply for other positions in the United States. In October 1998, Mr. Kanth wrote an application letter to Florida Atlantic University in which he declared:

> I am specially happy to be applying to Florida Atlantic for a suitable position in economics. Briefly, my current status is that I am in the running for a Chair in economics here at the UTS, having just returned from a visiting stint at Harvard. However, my sights are set elsewhere: for years now, I have been seeking to return to the US for professional and personal reasons (my family lives in Utah.)

(Id. at 021) (Letter from Kanth to Florida Atlantic University of 10/10/1998).

In a letter written to Mrs. Kanth's father in May 1999, Mr. Kanth makes clear his desire to find work in the United States:

> I am trying my best, as I have had for years, to find employment back in the US: in the very short run, this may or may not happen But the long run prospects remain very high given the level of my productivity It may happen as early as this Fall, or maybe a bit later.

(Id. at 032) (Letter from Kanth to Meyer of 5/5/1999)

According to Mrs Kanth, Mr Kanth feared that the time he spent as a lecturer at UTS, a business school, and not as a professor at a nationally-ranked university, would damage his academic reputation and his future job opportunities In fact, Mr Kanth was apparently so dissatisfied with his positon at UTS, that he considered accepting a job at the National University of Singapore, when an offer was extended to him in January 1999 (Id at 027) (Letter from National University of Singapore to Kanth of 1/29/1999)

During their second stay in Australia, the Kanth family again lived in rented apartments. According to Mrs Kanth, the family lived in a total of seven different rented lodgings during their two stays in Australia.

Mr. and Mrs. Kanth disagree about the children's adjustment to their life in Australia. According to Mr. Kanth, the children enjoyed life in Australia and had friends and playmates there. Mrs. Kanth disputes this claim and goes into considerable detail about the loneliness her children experienced during both their stays in Australia. (Cory Leigh Kanth Aff. at 25-27.) The evidence is not clear on this question. For example, Malini was a student at the Randwick School during the family's second stay, and her December 1998 report card from the school reflected that she was "a very capable child" and did well in her studies. (Cory Leigh Kanth Aff. Exs. at 143)

(Student Progress Report). However, the teacher noted that Malini was "quite timid and reserved." (Id.). On the other hand, Malini's principal at the Randwick School, Peter Kensell, stated that "Socially, Malini had a number of close friends who enjoyed her company in the classroom and the playground " (Petitioner's Mem Supp. Petition Ex. J) (Letter from Kensell to whom it may concern of 6/23/1999). Mr. Kanth also asserts that Malini engaged in various extracurricular activities while in Australia, such as piano lessons and ballet However, there is nothing in the record that casts doubt upon Mrs Kanth's statements that Malini attended these activities infrequently, going to only three piano lesson and one ballet lesson (Cory Leigh Kanth Aff. at 26.)

Mr Kanth has submitted several letters from professional colleagues For the most part, none of the letters are of particular assistance to the court because of their conclusory nature, lack of detail, and statements to the effect that Mr and Mrs. Kanth enjoyed a warm, loving relationship. Such assessments cast doubt on the accuracy of the other statements made by the authors, because there is no question that the relationship between Mr. and Mrs Kanth was deeply troubled and worsened during their stays in Australia, and by March 1999, the relationship between Mr. and Mrs. Kanth had deteriorated to the point that Mrs. Kanth returned to Salt Lake City with the children.

Discussion

The purpose of the Hague Convention is "to secure the prompt return of children wrongfully removed or retained" so that the courts of the county where the children habitually reside may make a determination of custody. Hague Convention, Art. 1.

To obtain relief under the Hague Convention, a petitioner has the burden of proving, by a preponderance of the evidence, that the children have been wrongfully removed or retained. See 42 U.S.C. § 11603(e)(1). A removal or retention is "wrongful" if:

> (a) it is in breach of rights of custody attributed to a person . . . under the law of the State in which the child was habitually resident immediately before the removal or retention, and (b) at the time of removal or retention those rights were actually exercised . . . .

Hague Convention, Art. 3.

The first question, then, is whether Australia was the habitual residence of the two Kanth daughters before Mrs. Kanth took them from Australia in March 1999 If the habitual residence of the children was not Australia, then there was no wrongful removal. See Ponath v. Ponath, 829 F. Supp. 363, 364 (D. Utah 1993) (internal citation omitted).

The term "habitual residence" is not defined in either the Hague Convention or ICARA. Courts have speculated that the "'intent is for the concept [habitual residence] to remain fluid and fact based, without becoming rigid.'" Id at 365 (quoting Levesque v. Levesque, 816 F. Supp. 662, 665 (D. Kan. 1993)).

The Third Circuit has discussed the concept of habitual residence in detail, noting that although it is the child's habitual residence that must be determined, in the case of a young child, "the conduct and the overtly stated intentions and agreements of the parents during the period preceding the act of abduction are bound to be important factors and it would be unrealistic to exclude them." Feder v. Evans-Feder, 63 F.3d 217, 223 (3rd Cir. 1995). The court further explained:

> [T]here must be a degree of settled purpose. The purpose may be one or there may be several. It may be specific or general. All that the law requires is that

> there is a settled purpose. That is not to say that the propositus intends to stay where he is indefinitely. Indeed his purpose while settled may be for a limited period. Education, business or profession, employment, health, family or merely love of the place spring to mind as common reasons for a choice of regular abode, and there may well be many others. All that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled.

Id (citation omitted). The court determined that:

> a child's habitual residence is the place where he or she has been physically present for an amount of time sufficient for acclimatization which has a degree of "settled purpose" from the child's perspective We further believe that a determination of whether any particular place satisfies this standard must focus on the child and consists of an analysis of the child's circumstances in that place and the parents' present, shared intentions regarding their child's presence there

Id at 224.

When the above definitions are applied to the facts here, it is evident that the habitual residence of the Kanth daughters immediately before being taken to the United States in March 1999 was not Australia but the United States. In March 1999, Malina was almost six years old, Anjana three. They had spent nine months in Australia on their first stay, and approximately the same amount of time on their second. Although Malina had attended school in Australia, the evidence suggests that she may have had difficulty finding friends in school and felt isolated And as far as whether Anjana could be seen as settled in Australia, due to her young age, the focus must be dictated by the perspective of her parents.

Also significant, and evidence that the children would not have been "acclimatized" to their life in Australia and would not have felt "settled" in their Australian surroundings, is the fact that the family lived in a succession of rented dwellings. Adding to the unfamiliarity of the children's surroundings, the rented accommodations in which they were living were not furnished

with the family's own belongings. The photographs submitted by Mrs. Kanth show that much of the family's furniture and personal belongings were stored while the family was in Australia. The stored belongings include such items as Malini's rocking chair, the children's chest and toy cupboard, the children's yard furniture, and Malini's bicycle and Anjana's tricycle. Such items are the kind that children rely on to give them a sense of home and belonging, and the Kanth children did not have these familiar belongings with them when they were in Australia.

The evidence is also overwhelming the children's parents believed that their two stays in Australia would be temporary, and brief. Mrs Kanth adamantly insists that she went to Australia reluctantly, relying on her husband's assurance that the family would quickly return to the United States And Mr. Kanth's constant search for a teaching position in the United States, as shown by the numerous letters to and from colleges and universities in the United States, as well as his own words in his letter to Mrs. Kanth's father, undermines his present assertion that it was the family's intention to remain in Australia.

In sum, Mr. Kanth has failed to show that Australia was the habitual residence of the children and, accordingly, his petition is DENIED.

SO ORDERED this 14 day of December, 1999.

BY THE COURT:

Tena Campbell

TENA CAMPBELL
United States District Judge

ce

United States District Court
for the
District of Utah
December 14, 1999

* * MAILING CERTIFICATE OF CLERK * *

1: 2:99-cv-00532

ue and correct copies of the attached were mailed by the clerk to the llowing:

Rajani K. Kanth
WAGNER COLLEGE
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ADDENDUM “B”

12/11/99—

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

RAJANI K. KANTH, Plaintiff, vs. CORY LEIGH KANTH, Defendant.	ORDER Case No. 2:99CV532C

Petitioner Rajani Kanth has filed a pro se request for access to his children pursuant to Article 21 of the Hague Convention. However, since petitioner has filed an appeal of this court's order dismissing his petition, the court is without jurisdiction to consider any new filings in this case.

SO ORDERED this 17 day of December, 1999.

BY THE COURT:

Tena Campbell

TENA CAMPBELL
United States District Judge

72

asb

United States District Court
for the
District of Utah
December 20, 1999

* * MAILING CERTIFICATE OF CLERK * *

: 2:99-cv-00532

ıe and correct copies of the attached were mailed by the clerk to the
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ADDENDUM “C”

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

RAJANI K KANTH,

Petitioner-Appellant,

v.

COREY LEIGH KANTH,

Respondent-Appellee

No 99-4246

ORDER
Filed January 19, 2000

Before **EBEL** and **MURPHY**, Circuit Judges.

Petitioner-appellant Rajani K. Kanth seeks an order of this court enjoining divorce proceedings in Utah state court during the pendency of his appeal from the district court's order denying his petition pursuant to the International Child Abduction Remedies Act, 42 U.S.C. §§ 11601-11610, and the Hague Convention on the Civil Aspects of International Child Abduction. In order to obtain injunctive relief pending appeal, an appellant must show (1) that he will likely be successful on appeal; (2) that he will be irreparably harmed if the injunction is not granted; (3) that the opposing party will not be harmed if the injunction is

granted; and (4) that the public interest does not oppose granting the injunction. See 10th Cir. R. 8.1.

Upon consideration of appellant's motion and the applicable law, this court concludes that he has failed to demonstrate satisfaction of the above standards. Accordingly, his motion for injunctive relief pending appeal is denied

Entered for the Court
PATRICK FISHER, Clerk

By L. Bahyano
Deputy Clerk

Mr. Frederick N. Green
Green & Berry
10 Exchange Place
#622
Salt Lake City, UT 84111

ADDENDUM “D”

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

June 25, 2001

Mr. Frederick N. Green
622 Newhouse Building
10 Exchange Place, #622
Salt Lake City, UT 84111

Re: Rajani Kanth
v. Cory Kanth
No. 00-1630

Dear Mr. Green:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

William K. Suter

William K. Suter, Clerk

ADDENDUM "E"

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

August 27, 2001

Mr. Frederick N. Green
622 Newhouse Building
10 Exchange Place, #622
Salt Lake City, UT 84111

Re: Rajani Kanth
v. Cory Kanth
No. 00-1630

Dear Mr. Green:

The Court today entered the following order in the above entitled case:

The petition for rehearing is denied.

Sincerely,

William K. Suter

William K. Suter, Clerk

ADDENDUM “F”

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

RAJANI K. KANTH

Petitioner/Appellant,

vs.

Appeal No. 99-4246

CORY LEIGH KANTH

Respondent/Appellee.

On Appeal from the United States District Court
for the District of Utah, Central Division

APPELLEE'S BRIEF

(Oral Argument Not Requested)

FREDERICK N. GREEN
GREEN & BERRY
622 Newhouse Building
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Salt Lake City, Utah 84111
Attorney for Respondent/Appellee

RAJANI K. KANTH (*Pro Se*)
c/o The Copthorne Orchid Hotel
214 Dunearn Road
Singapore 299526
Petitioner/Appellant Pro Se

Related Appeal(s):

There are no prior or related appeals.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Pages**

Rules

Publications

STATEMENT OF THE CASE

A. NATURE OF THE CASE

Petitioner/Appellant commenced these proceedings under the International Child Abduction Remedies Act, 42 USC § 11601-11610 (referred to herein as "ICARA") (Appendix Exhibit "A ", Pages 1 to 9), which Act implements the Convention on the Civil Aspects of International Child Abduction (sometimes referred to as the "Hague Convention" or the "Convention") (Appendix Exhibit "B", Pages 10 to 23). The Petition alleges that the removal of the children from Australia was wrongful because that was the state of habitual residence at the time of the removal, under the terms the Hague Convention. Cory Kanth, the Respondent, replies claiming that the United States is the habitual residence and therefore there was no wrongful removal.

B. THE COURSE OF THE PROCEEDINGS AND DISPOSITION BELOW

Mrs. Kanth returned to the State of Utah with the parties' two minor children on March 25, 1999. The Petitioner commenced this action on July 8, 1999. An evidentiary hearing was scheduled for August 24, 1999. At that hearing the parties' settlement which called for the dismissal of the Petition was read on the record and approved by the Court. The Petitioner, though present in Salt Lake City, Utah, did not attend the hearing. Rather, his two attorneys approved the Stipulation.

Mr. Kanth subsequently discharged his attorneys and appearing *Pro Se* and moved to set aside the Stipulation and Order which motion was granted on October 18, 1999. The matter was set for evidentiary hearing for December 9, 1999. Prior to the hearing the parties were ordered to proffer their case by affidavit and documentary evidence and to allow for the cross examination of all affiants who resided in the United States. Just prior to the December hearing the Petitioner moved to continue the matter, again, and in lieu thereof waived his right to a hearing. The case was decided on the record including the Petitioner's deposition. The Court entered its "Order" December 14, 1999 finding that the Petitioner had failed to establish wrongful removal of the children by the Respondent because the Petitioner had failed to show that Australia was the state of habitual residence of the children. (Order, dated December 14, 1999, Docket No. 68.)

C. STATEMENT OF THE RELEVANT FACTS.

1. The parties are both citizens of the United States (Affidavit of Respondent, dated August 18, 1999, ¶ 4, p. 2, Docket No. 26, hereinafter referred to as "Respondent's Affidavit I").

2. The parties are husband and wife having been married in Salt Lake City, Utah March 6, 1990. (Respondent's Affidavit I, ¶ 2, p. 2, Docket No. 26.)

3. The parties have two children of the marriage, Malini, born April 1,

1993 and Anjana, born February 20, 1996. (Respondent's Affidavit I, ¶ 3, p. 2, Docket No. 26.)

4. The Kanth family purchased a home and lived continuously in Salt Lake City, Utah through June, 1996. (Petitioner's Affidavit, ¶¶ 3-5, Exhibit A, Part 2 of Petitioner's Memorandum, Docket No. 9.)

5. In 1993, Mr. Kanth was denied tenure at the University of Utah. He desperately searched for employment in the United States as a professor, sending out between 90 to 150 resumes to various colleges and universities. However, Mr. Kanth was unsuccessful. Therefore, shortly following the birth of Anjana, Mr. Kanth accepted a temporary academic position with the University of Aarhus in Denmark. (Petitioner's Affidavit, ¶ 5, Exhibit A, Part 2 of Petitioner's Memorandum, Docket No. 9, Respondent's Affidavit I, ¶ 12, p. 4, Docket No. 26.)

6. Mr. Kanth left for Denmark on June 28, 1996 without Mrs. Kanth or the children. They remained in Utah and later joined him on September 24, 1996. (Respondent's Affidavit I, ¶ 5, p. 2 & 3, Docket No. 26.)

7. Mrs. Kanth and the children left Denmark on April 16, 1997 without Mr. Kanth and returned to Salt Lake City, Utah. Upon their return to Utah, Mrs. Kanth enrolled Malini in preschool. She made many friends and excelled in school. (Respondent's Affidavit I, ¶ 43, p. 19 & 20, Docket No. 26.)

8. Mr. Kanth joined his family in Utah on June 3, 1997. He immediately began looking for employment as a professor at colleges and universities in Utah, and, alternatively, throughout the United States. He sent out hundreds of resumes to American schools over several months. However, he was once again unsuccessful in finding a job in the United States. (Respondent's Affidavit I, ¶¶ 5, 12, p. 2 & 3, 4 & 5, Docket No. 26.)

9. He did receive a six-month appointment at the University of New South Wales in Australia. Neither Mrs. Kanth or the children wanted to move. They voiced their opposition to Mr. Kanth on several occasions. However, because of the family's precarious financial situation, Mr. Kanth accepted the position. He told Mrs. Kanth it would only be for six months and could lead to a position in the United States. On this basis, Mrs. Kanth agreed to accompany him with the children. (Respondent's Affidavit I, ¶ 19, p. 7, Docket No. 26.)

10. The Kanth family obtained a temporary visa and arrived together in Australia on July 17, 1997. They left all of their furnishings and personal belongings, other than a limited amount of clothing, in storage in Salt Lake City, expecting to return within six months. (Respondent's Affidavit I, ¶¶ 5, 13, p. 2 & 3, 5 & 6, Docket No. 26.)

11. During their first three weeks in Australia, the family stayed in a

temporary lodge. They later rented a fully-furnished apartment for which they signed a six-month lease. (Respondent's Affidavit I, ¶ 73, p. 28, Docket No. 26.)

12. While in Australia, Mr. Kanth's controlling and abusive behavior toward Mrs. Kanth worsened. He threatened to "kick [her] teeth in" when he discovered she bathed the children without his permission. He refused to allow her to choose the childrens' clothing. He called her derogatory names in front of the children, such as a "squaw, "Avon lady," "low class" and "idiot". He stood over her when she brushed the children's hair and angrily grabbed the brush from her hands if either said "ouch". He allowed her to leave the house only to take Malini to and from school and to buy groceries. (Respondent's Affidavit I, ¶ 47, p. 21, Docket No. 26.)

13. While the family was in Australia, Mr. Kanth continued to search for employment in the United States. He failed to obtain any offers. The family had no money to return to the United States. Therefore, when the University of New South Wales offered him a six-month extension, he accepted. (Respondent's Affidavit I, ¶¶ 21, 22, p, 8 & 9, Docket No. 26.)

14. Because the family's six-month lease on their first apartment expired, they found alternative housing. They signed another six-month lease but broke it early to return to Salt Lake after three months. (Respondent's Affidavit I, ¶ 21, p. 8,

Docket No. 26.)

15. During their entire stay in Australia, Mr. Kanth kept control of each family members' passport. (Respondent's Affidavit I, ¶ 21, p. 8, Docket No. 26.)

16. Mr. Kanth did not complete his second six-month term with the University of New South Wales. He, instead, returned with Mrs. Kanth and the children to the United States on April 6, 1998 in search of employment there. (Respondent's Affidavit I, ¶ 22, p. 8 & 9, Docket No. 26.)

17. The return to Salt Lake City in March 1998 was intended to be a permanent relocation to Salt Lake City. The return to Salt Lake City was occasioned due to the Petitioner's insistence and the parties' mutual dissatisfaction with their life in Australia. (Affidavit of Respondent, dated November 30, 1999, Docket No. 63, hereinafter referred to as Respondent's Affidavit II, ¶¶ 8-12, p. 3 & 4)

18. Mrs. Kanth again enrolled Malini in preschool. She and Anjana reunited with several friends and enjoyed playing with them. (Respondent's Affidavit I, ¶ 23, p. 9 & 10, Docket No. 26.)

19. Mr. Kanth looked at several apartments in Salt Lake, where he also made many job inquiries. (Respondent's Affidavit I, ¶ 23, p. 9 & 10, Docket No. 26.)

20. In the event he was not able to find a job in Utah, Mr. Kanth also submitted applications and resumes to several colleges and universities outside of Utah but within the United States. He interviewed for a position in Pennsylvania and traveled to Harvard to explore his connections there. (Respondent's Affidavit I, ¶ 23, p. 9 & 10, Docket No. 26.)

21. Mrs. Kanth received an offer of employment in Salt Lake. Mr. Kanth, however, refused to allow her to accept it. (Respondent's Affidavit I, ¶ 29, p. 11 & 12, Docket No. 26.)

22. Mr. Kanth was again unable to find employment as a professor in the United States. He, therefore, accepted a position previously offered to him at the University of Technology, Sydney. (Respondent's Affidavit I, ¶ 23, p. 9 & 10, Docket No. 26.)

23. Professor Kanth was never satisfied with the position at the University of Technology, Sydney (UTS). This position was that of a lecturer and he considered it a "step down" from his earlier position at the University of New South Wales. (Respondent's Affidavit II, ¶ 17, p. 6 & 7, Docket No. 63.)

24. Professor Kanth's disappointment and dissatisfaction with his UTS position is supported by E.K. Hunt, Economics Professor and Chair of the Department of Economics, University of Utah, who states:

> ". . . UTS (University of Technology of Sydney) is a new college that was until recently a technical school. Employment at that school would generally be regarded by most academics as one of the least desirable positions in the academic world." (Affidavit of E.K. Hunt, November 30, 1999, Docket No. 22, p. 1.)

25. Mrs. Kanth again objected to going back to Australia. However, Mr. Kanth assured her that a position at Duke University would come through and the family would only be in Australia, for two months at the very longest. Mr. Kanth agreed that in the event the position at Duke did not materialize, Mrs. Kanth would return to Utah with the children. Based upon these representations, Mrs. Kanth agreed to again accompany him. (Respondent's Affidavit I, ¶¶ 24-25, p. 10, Docket No. 26.)

26. The family was scheduled to leave for Australia on July 5, 1998. However, none of them wanted to go. They loaded the few suitcases they packed into a van but decided not to leave. The next day, Mr. Kanth determined the family would have to go. He told them to put their bags in the car. They left so quickly between the time he made the decision and the time they left that they barely had time to reload their bags. The family left reluctantly for Australia on July 6, 1998. Their property again remained in storage. (Respondent's Affidavit I, ¶ 29, p. 11 & 12, Docket No. 26.)

27. When they arrived, they negotiated a six-month lease for a fully

furnished home that included a car. That was the shortest lease period the Kanth's were able to obtain. (Respondent's Affidavit I, ¶ 29, p. 11 & 12, Docket No. 26.)

28. Mr. Kanth's abusive behavior toward Mrs. Kanth worsened. He monitored Mrs. Kanth's time very closely. He only taught school two evenings a week and was at home the rest of the time. He allowed Mrs. Kanth to leave the home only with his permission, only for a reason acceptable to him and only for a specified amount of time. The infrequent occasions she was allowed to leave, he became enraged if she was not home at the precise time he calculated she should arrive. (Respondent's Affidavit I, ¶ 48-49, p. 21 & 22, Docket No. 26.)

29. Mr. Kanth completely controlled the family's money. He refused to give Mrs. Kanth money for anything but necessities, such as groceries or school expenses for the children. The money he did give to her for these things was minimal. When she returned from shopping, Mr. Kanth compared the amount she had spent with the amount of money he had given to her. He required her to give him any change. (Respondent's Affidavit I, ¶ 48, p. 21 & 22, Docket No. 26.)

30. Mr. Kanth gave Mrs. Kanth no money with which to open a checking account and, because of a bankruptcy he filed in their names several years earlier, she was unable to obtain a credit card. (Respondent's Affidavit I, ¶ 48, p. 21 & 22, Docket No. 26.)

31. On August 29, 1998, Mr. Kanth discovered that Mrs. Kanth had bathed the children while he was at work. He became enraged and told Mrs. Kanth she "couldn't be trusted", and that he would "have to figure out what to do about it". Mrs. Kanth asked Mr. Kanth to allow her to return to the United States with the children, as he earlier promised and file for a divorce. He told Mrs. Kanth in front of the children that she was "nothing but a squaw" and he would "rather shoot myself in the head than allow you and your family to raise these little girls". (Respondent's Affidavit I, ¶ 42, p. 18 & 19, Docket No. 26.)

32. On another occasion, Mr. Kanth locked Mrs. Kanth out of their apartment in her pajamas on a cold winter morning and refused to let her back in. (Respondent's Affidavit I, ¶ 47, p. 21, Docket No. 26.)

33. Malini was terrified to go anywhere after learning she could contract a deadly strain of meningitis through a sneeze from an infected person. She routinely asked Mrs. Kanth if she was going to die and isolated herself from others. (Respondent's Affidavit I, ¶ 62, p. 25, Docket No. 26.)

34. Malini's school attendance declined dramatically. When she did attend school, she generally ate lunch alone. The children in her school excluded her and referred to her as "our American visitor". She did not make her first friend until the middle of the year. (Respondent's Affidavit I, ¶ 62, p. 25, Docket No. 26.)

35. The Kanth's never planned to look for a house because they intended their stay to be temporary. (Respondent's Affidavit I, ¶ 74, p. 28, Docket No. 26.)

36. The children were isolated. The few extracurricular activities in which they participated were minimal. Malini took only three music lessons and one ballet lesson the entire time they lived in Australia. (Respondent's Affidavit I, ¶¶ 65-66, p. 26, Docket No. 26.)

37. None of the jobs in the United States materialized. Mr. Kanth, however, continued to refuse to allow Mrs. Kanth and the children to return, as promised. Malini repeatedly stated she wanted to go home and asked on several occasions when they would return to Utah. (Respondent's Affidavit I, ¶ 32, p. 13, Docket No. 26.)

38. In January, 1999, Mr. Kanth received an offer of employment from a university in Singapore. Singapore is not a party to the Convention. Mrs. Kanth became worried about Mr. Kant's threats that he would not allow her to raise the children. She feared that Mr. Kanth would retain the children and she would lose any legal rights she might have to them. (Respondent's Affidavit I, ¶¶ 33-34, p. 13 & 14, Docket No. 26.)

39. Mrs. Kanth suggested that she and the children return to the United States while Mr. Kanth tested the Singapore job. Mr. Kanth told Mrs. Kanth that "his" children would never again enter her parents' home except with him there. He stated that their children would be better off in India around "proper" people and the children. India is also not a party to the Convention. (Respondent's Affidavit I, ¶¶ 33-34, p. 13 & 14, Docket No. 26.)

40. Since returning to Utah, Malini has become much more involved in school. She has not experienced any panic attacks and has become more extroverted, playing and associating with friends with whom she attended preschool prior to leaving for Australia. (Respondent's Affidavit I, ¶ 71, p. 27, Docket No. 26.)

41. Mr. Kanth traveled to Utah on April 3, 1999. He did not appear to be upset that Mrs. Kanth and the children had left. He seemed relieved to be back in the United States. He never demanded that the children return to Australia. (Respondent's Affidavit I, ¶¶ 35-36, p. 4 & 5, Docket No. 26.)

42. Mr. Kanth resumed searching for employment in Utah and the United States. When he was again unsuccessful, he returned to his job at the University of Technology, Sydney on April 22, 1999. (Respondent's Affidavit I, ¶ 37, p. 15 & 16, Docket No. 26.)

43. When Mr. Kanth told Mrs. Kanth he was returning to Australia, he admitted it was the only way he might regain custody of Malini and Anjana. He also told Mrs. Kanth that he "cared nothing for the children", she was all that mattered. (Respondent's Affidavit I, ¶ 38, p. 16, Docket No. 26.)

44. Mr. Kanth always kept a mailing address in Utah. He obtained a post office box and later listed Mrs. Kanth's parents' residence as his own on numerous receipts and applications while in Australia. (Respondent's Affidavit I, ¶ 15, p. 6, Docket No. 26.)

45. Mr. Kanth maintained his Utah driver's licence and eligibility to vote while abroad. (Respondent's Affidavit I, ¶ 15, p. 6, Docket No. 26.)

46. While in Australia, the children visited doctors for various childhood illnesses. They did not have one doctor in Australia but saw several for various illnesses. (Respondent's Affidavit I, ¶ 51, p. 22, Docket No. 26.)

47. Dr. Tom Metcalf is Malini's and Anjana's pediatrician in Utah. He has been their doctor since birth and has seen them on many occasions. He remained their primary physician while the Kanth's were abroad, examining the children each of the three summers they returned to the United States. (Respondent's Affidavit I, ¶ 58, p. 24, Docket No. 26.)

48. The parties' attempts to acclimatize themselves and the children while in Australia failed because of:

a. Culture differences;

b. Mr. Kanth's refusal to permit the children to freely associate with their peers;

c. The frequency of the parties' moves while residing in Australia (several different residences); and,

d. The continual discussion of the family including the children regarding their anticipated return to the United States as soon as possible. (Respondent's Affidavit II, ¶ 28(d), p. 8, Docket No. 63.)

49. During the pendency of this Petition, as early as June 1999, Professor Kanth accepted a one year teaching position as Wagner College in New York. The Petitioner failed to disclose this new contract and teaching position as well as his intention to return to the United States until sometime after the initial hearing was scheduled. It was only when it would be to difficult to conceal his whereabouts that he disclosed his relocation. The Petitioner stated many times that he believed even once semester at a "state side" university or college would give him the opportunity to seek something more permanent in the United States. (Respondent's Affidavit II, ¶ 37, 40, p. 10 & 11, Docket No. 63.)

50. The Petitioner has now accepted yet another position, this time in Singapore, according to his current notice of change of address on file herein.

SUMMARY OF ARGUMENT

The Hague Convention considers the removal of a child from his or her habitual residence wrongful. The Convention is designed to order the return of the child to the child's habitual residence more or less as a jurisdictional determination. In this case the children were not removed from their state of habitual residence but returned to their habitual residence in the United States of America, State of Utah.

The term "habitual residence" is an issue of fact and not subject to hyper-technical legalistic interpretations or tests. The case law has emphasized three factors in determining habitual residence: (1) the parties' intent or purposeful design, including the voluntariness of their decision; (2) time; and, (3) geography. Where the period of residence is less than one year decisions on habitual residence depend primarily on the parties' intention. Where the residence was less than one year, Courts are much more inclined to find a temporary purpose for the residence and therefore no change in habitual residence.

The parties' two visits to Australia with their children were intended and designed to be temporary. All of their behaviors were consistent with this temporary design. Their furniture and personal effects were left behind in Utah.

They maintained a Utah address and all other legal attachments (driver's license, mailing address, etc.). The parties and their children moved seven times while in Australia. The children did not acclimatize. The Petitioner emotionally and physically controlled the Respondent so that she stayed on longer in Australia than was intended or promised. The Petitioner desparetly sought employment in the United States during the entire time he was in Australia. Finally, the Petitioner moved to New York to take a position there and has since left New York to take a position in Singapore.

When Mrs. Kanth returned to Utah Mr. Kanth clearly acquiesced in the move. Even if her return was "wrongful" Mr. Kanth's acquiescence is a complete defense to any Hague Convention Petition.

ARGUMENT

I. CORY KANTH'S RETURN TO UTAH WITH THE PARTIES' CHILDREN WAS NOT WRONGFUL BECAUSE THE UNITED STATES WAS THEIR HABITUAL RESIDENCE.

Article 3 of the Convention provides, in pertinent part, that:

> "The . . . retention of a child is to be considered wrongful where . . . paragraph (a) it is in breach of rights of custody attributed to a person . . . under the law of the state in which the child was habitually residence immediately before the removal or retention."

This case does not present an issue regarding Mr. Kanth's rights of custody. Therefore, the principal issue before the Court regards the children's habitual residence when Cory Kanth returned to the State of Utah on March 25, 1999.

The terms "habitual residence" is not defined under the convention. Instead a child's habitual residence is to be determined by examining the specific facts and circumstances in each case. Zuker v. Andrews, 2 F.Supp. 2.d 134 (D. Mass. 1998); Meredith v. Meredith, 759 F.Supp. 1432 (D. AZ. 1991); LeVesque v. LeVesque, 816 F.Supp. 622, 666 (D. Kan., 1993). Courts should not interpret the term technically or restrictively. Rydder v. Rydder, 49 F.3d 369, 373 (8 Cir. 1995).

> "The question whether a person is or is not habitually resident in a specified country is a question of fact to be decided by reference to all of the circumstances of any particular case." (Lord Brandon of Oak Brooke, In Re Jay (a minor) abduction; custody rights) [1990] 2 A.C., @ P. 578; [1990] 3.W.L.R. @ P. 504; [1990] 2.ALL E.R. @ P. 965.

Determining the fact question of habitual residence involves the consideration of three principal elements: (1) intent, voluntariness, or purposeful design; (2) a lapse of a sufficient period of time; and, (3) geography or location (see, The Concept of Habitual Residence, Dr. E. M. Clive, the Juridical Review, 1997, Part 3, Page 137, included in Respondent's Appendix as Exhibit "C", Pages 24 to 35.)

Application of Ponath, 829 F.Supp. 363 (D. Utah 1993) habitual residence in Germany was not found where the parties' visit to Germany was based upon Mr. Ponath's promise to return within three months. Additionally, Mr. Ponath refused to let his wife and child leave and the Court found that she was detained in Germany against her desires by means of verbal, emotional, and physical abuse. In spite of a ten month stay in Germany Mr. Ponath's Petition to return the child to Germany was denied. Judge Sam declared, "The Concept of Habitual Residence must . . . entail some element of voluntariness and purposeful design . . . [a] settled purpose." Application of Ponath, Id. @ 367.

> "Where the period of residence is less than a year there are decisions both ways. Much depends on purpose or intention in this type of case and Judges are much more likely to find that a temporary purpose for the residence prevents it from being habitual residence. " (The Concept of Habitual Residence, Dr. E. M. Clive, Id. @ p. 27.)

Although it takes time to establish habitual residence, it takes no time at all to terminate that status. All that is required is an intention on departure to stay permanently in another country. See International Child Abduction, Sandra Davis, Jeremy Rosenblatt and Tanya Galbraith, Sweet & Maxwell, 1993, P. 55, citing, C v. S, (Minor: Abduction: Illegitimate Child), @ P. 55, (the summary of this case, together with its full citation, is attached hereto in Respondent's Appendix Exhibit "D", Page 36.) In C v. S an unmarried couple had a child born to them in 1987

while they resided in Australia. In 1990 the mother returned permanently to England without informing the father of her intention or preparations. Before the unmarried father could establish his rights of custody the Court found that the mother had established habitual residence in England. The former habitual residence in Australia had been terminated immediately upon her departure.

In this case, the parties disagree as to their intention regarding both trips to Australia. Mrs. Kanth maintains that in both cases the trips were meant to be temporary with the specific intention to return at the earliest opportunity. Furthermore, Mrs. Kanth has documented that mutual intention extensively. The Kanth family took only clothing with them when they went to Australia on both occasions. They rented fully furnished apartments in Australia and moved seven different times. All of their important furniture and belongings remained in Utah anticipating their return. These belongings included personal mementos and items of particular significance to the children such as their toys, a child's rocking chair, family pictures and the like.

Even if the parties established habitual residence in Australia during their first visit, which is strenuously denied by Mrs. Kanth, that status was terminated upon their first return to the United States. At the time of their first return in the spring of 1998, the parties left their apartment and forfeited a substantial lease deposit. Their

departure was abrupt. It was occasioned by Mr. Kanth's reliance upon "psychic" readings and advice. Upon their return to the United States the oldest daughter was re-enrolled in school. The children were attended to by their historical family physician. All in all, their old family life resumed and went forward in Utah.

The parties' first visit to Australia was less than satisfactory. The family continually discussed their imminent return to Salt Lake City. The children had not acclimatized or socialized well in Australia. At all times relevant to these proceedings Mr. Kanth maintained the family mailing address in Utah and listed it as his residence on his applications for employment and directed that responses be sent there. In fact, Mr. Kanth set in place detailed plans and instructions with his father-in-law regarding correspondence and communication from prospective employers. Mr. Kanth also listed the family's Utah address on numerous personal receipts and forms. He maintained his Utah driver's license and eligibility to vote. The Visa giving the family permission to live in Australia was for a temporary period.

When Mr. Kanth could not find employment in the United States as soon as he had hoped, the parties saw no alternative but to return to Australia for a brief and temporary period of time in July 1998. Having already visited Australia the parties were certain that they did not want to remain. Mr. Kanth anticipated job

opportunities including one particular position at Duke University. Mrs. Kanth was reassured and promised that the second visit to Australia would be for a period of weeks perhaps up to six weeks at the longest. With that in mind, the family visited Australia once again exhibiting the same behaviors they did before but with a new found resolve to limit their stay in Australia all the more. For the second visit the parties were certain that they did not wish to reside in Australia and Mrs. Kanth was certain that they would not have to, but for a very brief period of time.

Mr. Kanth attempts to minimize the significance of his extraordinary job search efforts. He has stated that his hundreds of applications for employment in the United States, while he was employed at UTS, and at the expense of UTS, constitute a common practice in the industry. Dr. E.K. Hunt, Professor of Economics and Chair of the Department of Economics at the University of Utah observed that such a practice is unusual:

> "I do not know a single academic who has used either applications or job offers in this way. I have heard stories of this being done. I can state, however, that it is very rare, and that in no case, in these stories, has a person sent out hundreds of applications. Where it is done, the individual is virtually always a famous, very highly regarded academic and two prestigious universities are 'bidding' for him or her. I can assure you that Rajani Kanth does not fall into this category. I seriously doubt if any faculty member in either UTS or Wagner College fits this category.

> I believe that any fair minded academic seeing an instructor at UTS sending out hundreds of applications would conclude that the instructor is desperate to leave. When Dr. Kanth communicated with me I definitely felt that he wanted desperately to leave." Affidavit of E. K. Hunt, dated November 30, 1999, p. 2, Docket No. 22.)

It is during this same time, during the second visit, that Dr. Kanth's efforts to control the Respondent intensified, just as in the Ponath case. Not only did Dr. Kanth engage in emotional abuse and control, Cory Kanth was financially restrained from leaving and Dr. Kanth maintained physical possession of the passports until shortly before the Respondent's departure with the children.

Lastly, from the children's point of view, it cannot be said that Australia was ever their habitual residence. The parties' oldest child, Malini, attended school but only sporadically. She was referred to as "the American visitor". Her accent was ridiculed. She ate lunch alone and only made her first friend a couple of months before returning to the United States. That friend only visited the Kanth household once to play with Malini.

It cannot be found that a sufficient period of time elapsed in either the first visit or the second so as to conclude on that basis alone that Australia became the children's habitual residence. Therefore, the Court must discern the parties' intention from the objective evidence as much as possible. This was Judge Campbell's stated objective. Judge Campbell structured a "fast track" procedure

and stated in the process that she would give particular weight to the documents and objective evidence when comparing those facts to the parties' own testimony. In the process the Court properly concluded that the parties never had the proper intent to make Australia their residence and therefore lacked the "settled purpose" often referred to in Hague Convention case law. Judge Campbell was particularly impressed that the Kanth children never acclimatized to the Australian environment given the fact that there was no "settled purpose". Judge Campbell did not address the issue of "voluntariness", controlling behavior on the part of Mr. Kanth, or the emotional and physical abuse. Similarly, the Court did not address the issue of Professor Kanth's acquiescence. However, these two factors would also be grounds to sustain the Court's result.

II. PROFESSOR KANTH ACQUIESCED TO CORY KANTH'S RETURN TO SALT LAKE CITY WITH THE CHILDREN.

Even if Australia was the habitual residence of the Kanth family on March 25, 1999, that status would have been terminated based upon Mrs. Kanth's return to Salt Lake City and Dr. Kanth's acquiescence thereto. Acquiescence is a defense to an otherwise well taken Hague Convention Petition. See Re A and another (minors) (abduction: acquiescence) [1992] 1 ALL ER 929, CA; [1992] FAM. 106, Respondent's Appendix Exhibit "E", Pages 37 to 54. In Re A and another (minors)

the Court ignored a mother's secret moving of her children from Australia to England by finding that the father in his letters to the mother stated that he knew of the mother's actions, understood they were illegal but was not going to fight the matter.

Here the Petitioner wrote a letter to Marvin Meyer, the Respondent's father, which bears the "fax" date of April 5, 1999 which is document 032 - 033 attached to Respondent's Affidavit I, Docket No. 26. That letters states as follows:

> "I am trying my best, as I have had for years, to find employment back in the US: in the very short run, this may or may not happen. But the long run prospects remain very high given the level of my productivity. It may happen as early as this fall or may be a bit later . . .
>
> I have promised to organize life differently for her; we can buy a house here and live normally instead of living as if we were leaving the next day as we have since we arrived in Australia.
>
> Of course this is up to Cory: but you are my father-in-law, and about the only family I have left, and I want you to be assured that the basis exists now-as it has for some time now- for normalcy in our lives battered as we have been thus far by frequent moves.
>
> If Australia does not please her, and this is important for you to know, I am ready now to return to Utah and look for employment there, no matter what it takes.
>
> . . . I have a permanent job here, Cory will have one to. But only if she chooses to: if not, I will try to find a similar set up in the US asap so the kids and Cory can be

> close to family again. It is for this reason that I have spent the last five years applying to jobs in the US."

Once again, the Petitioner made good on his expectation. Before this case had even reached its first hearing, Dr. Kanth had accepted a position in New York at Wagner College although he failed to disclose that fact in time for the first hearing, August 24, 1999. The Wagner College posting was for a period of one year. Dr. Kanth testified that he still had his UTS position waiting for him. While this matter has been on appeal Dr. Kanth has taken yet another position in Singapore, thus continuing the "peripatetic existence" that the parties had experienced for years, ("Order" Judge Tena Campbell, December 14, 1999 at Page 4 quoting the letter from Owen to Kanth of May 11, 1999, document page number 020, exhibits to Respondent's Affidavit I, Docket No. 26.)

CONCLUSION

Mrs. Kanth's return with the parties' children to Utah was not wrongful. The United States, State of Utah was and remains the childrens' habitual residence for purposes of the Hague Convention. All of the parties' actions were consistent with their intention to live in Utah. Their visits to Australia were purely temporary. The children never became attached to the Australian residence or environment.

Even if the removal of the children was wrongful, Mr. Kanth acquiesced to their return. During the pendency of this case Mr. Kanth has relocated to the United States which effectively moots any claim under the Hague Convention.

The Order of Judge Tena Campbell dismissing the Petition should be upheld.

DATED THIS 10th day of March, 2000.

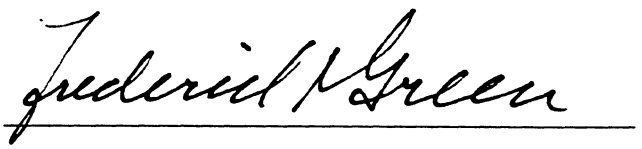
GREEN & BERRY

Frederick Green

FREDERICK N. GREEN
Attorney for Respondent/Appellee

CERTIFICATE OF COMPLIANCE

I, Frederick N. Green, hereby certifies that Appellee's Brief complies with the type-volume limitation of Rule 31(a)(7)(B)(i), Fed. R. App. P. and hereby states that the brief contains 3159 words and 349 lines, exclusive of the Statement of Facts, Tables and Certificates of counsel.



CERTIFICATE OF MAILING

I, Frederick N. Green, hereby certify that two full, true and correct copies of the above and foregoing **APPELLEE'S BRIEF** was placed in the United States mail at Salt Lake City, Utah, with first-class postage thereon fully prepaid, on the 10th day of March, 2000 addressed as follows:

RAJANI K. KANTH
c/o The Copthorne Orchid Hotel
214 Dunearn Road
Singapore 299526

Frederick N. Green